SUPREME COURT, U. S.
Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION BRIEF

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FOREWORD[1]

Petitioners believe that answers to statements and arguments advanced in NLRB's opposition brief are to be found in the Certiorari Petition. However, inaccuracies in NLRB's statements, arguments and positions prompt the instant reply by Petitioners, and Petitioners will follow the sequence used in NLRB's Opposition Brief.

UMW's Reply to NLRB's Statement of Questions Presented

Questions Presented by UMW (Pet. 3-4) appropriately set forth the questions involved herein.

[1]The parties and pagination references will be referred to herein as they were in the Certiorari Petition. In addition, NLRB's Opposition Brief is referred to as "Br."

Unless otherwise indicated, all emphases herein are supplied.

UMW's Response to NLRB's Statement

Neither the Special Master's factual narrative (Pet. 4a) nor the evidence (Tr. 376) supports NLRB's recital (Br. 3-4) that "on March 31, 1966 . . . one of the union pickets, who had accompanied petitioner Hobbs to the site, stated that Elkhorn would be organized even if it took bloodshed". The witness (Tr. 376), though claiming 40-50 men sought to have him and others join UMW, charged the bloodshed statement to *"one guy in the crowd"*, and conceding he did not know any of them, later learned that District 30's Newberry "was one of them"; and, as the record shows, Newberry was not held in contempt but *exonerated therefrom* by the Sixth Circuit (Pet. 23-27a).

The rock-throwing incident on April 11 mentioned by NLRB (Br. 4), as the Master's Report shows (Pet. 9-10a), followed *District 30's Beane's request* to "those assembled *to discontinue all picketing*"; and it fails to attribute the alleged act to any of the individual Petitioners or to show it to be the act of an agent of either Union Petitioner.

Similarly, the Master's Report of the truck driver allegedly hit by "a picket, who was holding UMW union membership application cards in his hand" (Pet. 11a), to which NLRB's brief (p. 4) alludes, does not state that any individual Petitioner was present or indicate who the "picket" was; and this information is not supplied by NLRB's reference to the testimony (Tr. 160-61).

The Master's findings (Pet. 14-15a), on which NLRB relies to show the Sixth Circuit properly found Petitioners contemned its decree, included two incidents where company property had been damaged by fire and explosion, but are totally without proof that Petitioners were connected with such acts. Indeed, examination of the

record reference given by NLRB (Tr. 264-76) discloses the witness, asked if he knew who committed the damage, responded, *"No, I don't know anything like that"* (Tr. 270).

Response to NLRB's charge (Br. 4) that Petitioner Castle was one of a group of pickets who threw stones at a Wright Construction Company truck is found in the Certiorari Petition (p. 18). Also, since the Union Petitioners neither actually authorized, nor actually participated in, nor ratified, after actual knowledge thereof, any picketing activities, NLRB erroneously charges "the Union employed mass picketing tactics" (Br. 4-5).

ARGUMENT

UMW's Reply to NLRB's Argument 1.

The Sixth Circuit's appointment of the Special Master and his findings of fact and conclusions of law which the Sixth Circuit approved related to the problem of whether, as NLRB charged, Petitioners had contemned the Sixth Circuit's May, 1960 decree. As Petitioners noted (Pet. 9) the respective parties disagreed on the standard of proof required to find the Petitioners guilty of civil contempt. In the Sixth Circuit, NLRB argued that *Norris-LaGuardia's* Section 6 has absolutely no application to the instant proceeding and that clear and convincing evidence on the record considered as a whole supported the Special Master's findings that Petitioners are in civil contempt of the May 20, 1960 decree. NLRB argues the Master's findings are to be accepted if supported by substantial evidence and are not clearly erroneous (Br. 6); but *U.S.* v. *General Motors Corporation*, 384 U.S. 127, professes the inapplicability of the rule where findings are premised on an erroneous interpretation of the standard to be applied. Such is the instant situation.

UMW's Reply to NLRB's Argument 2.

Since *NLRB* v. *Warren Co.*, 350 U.S. 107, involved an *employer—not a labor union*, it cannot appropriately be regarded as authority for NLRB's contention (Br. 6-8) that the Act's Section 2(13), rather than *Norris-LaGuardia's* Section 6 provides the applicable evidentiary standard in establishing Petitioners' liability in contempt in the instant action. Indeed, Petitioners' argument that a court of appeals' power to deal with contempt derives from its inherent power and not from the Act accords with *Warren Co.'s* avowal that "Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with the Board orders" (350 U.S. 112-13). It fortifies Petitioners' argument that the Sixth Circuit's power to enforce the Board's order became *functus officio* under the Act when the Sixth Circuit entered its May 20, 1960 decree.

Even though Congress, in enacting Section 2(13) expressly provided that union responsibility for acts of its union members and officers was to be measured by reference to ordinary doctrines of agency, Congress was careful in limiting the applicability of *Norris-LaGuardia's* Section 6 to restrict such limitation by applying it only to judicial power *"as provided in this section"*; and as Petitioners heretofore pointed out (Pet. 25) the instant contempt proceeding is not one which is "provided in this section". Worthy of repetition is the Second Circuit's admonition that "repeals by implication are not favored", especially where the Norris-LaGuardia Act is not a forgotten one, but is a significant piece of legislation which Congress had specifically in mind when it enacted the Act (*A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 2 Cir., 250 F. 2d 326, 330, cert. den. 355 U.S. 932).

The legislative history cited by NLRB (Br. 7) is not supportive of its argument that the Act's Section 2(13) is the proper guideline herein. To the contrary, House Conference Report No. 510 on H.R. 3020, as shown in 1 Legislative History of the Labor Management Relations Act, 1947, p. 540 shows that, as originally proposed, Section 12 of the House bill *would have made Norris-LaGuardia inapplicable to conduct of the precise type involved in this proceeding;*[2] Congress rejected Section 12's *broad* limitation; instead it limited *Norris-LaGuardia's* inapplicability to judicial power "as provided in this section".

The inappositeness of *International Ladies' Garment Workers Union* v. *NLRB,* D. C. Cir., 237 F. 2d 545, 551 and *UMWA* v. *Patton,* 4 Cir., 211 F. 2d 742, 748, cited by NLRB (Br. 7), is readily discernible since neither involved a contempt proceeding, both concerned factual situations to which the Act made Section 2(13) applicable, and both fell within the ambit of judicial authority granted courts of appeals by the Act's Section 10(e) or 10(f) or Section 303 (29 USCA 187). Indeed, even where Section 2(13) is applicable, *Garment Workers* condemned a Board decision resting on "simple findings that there was picketing and there was violence" but "No connection between the two" (237 F.2d 552), and *Patton*

[2]Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office), pp. 77-78, reads:

"Sec. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute."

(211 F.2d 750) rejected evidence which failed to show a connection between condemned conduct and the union.

While *Madden* v. *Grain Elevator, Flour & Feed Mill Workers, ILA, Local 418*, 7 Cir., 334 F. 2d 1014, rejected a contention similar to that posed herein by Petitioners and this Court denied certiorari (379 U.S. 967), *Polites* v. *U.S.*, 364 U.S. 426, 433, fn. 9, makes clear that denial of certiorari imports no expression of opinion upon the merits of the case. Notably, the Seventh Circuit assigns no reason for its conclusion on *Norris-LaGuardia's* Section 6's inapplicability; the factual situation therein showed that the alleged contemnor was "authorized by its members" to engage in the boycott and persisted therein despite the Court's order. Such is not the instant situation where admittedly Union Petitioners neither participated in, nor actually authorized, nor ratified any conduct violative of the Sixth Circuit's 1960 decree after actual knowledge thereof. The absence of any such *union* activity in NLRB's brief filed herein emphasizes the distinction from *Madden*.

In *Warren Co.*, 350 U.S. 110, NLRB was awarded certiorari where an employer was held not to have contemned a decree enforcing a Board order "Because of the importance of the question in the administration of" the Act. Similar importance exists herein where labor unions seek answer to the quaere if Congress intended by the Act's Section 10 to extend *Norris-LaGuardia's* inapplicability to civil contempt proceedings.[3]

[3]Holdings in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 445-46 and *NLRB* v. *Hopwood Retinning Co.*, 2 Cir., 104 F.2d 302, 305, to the effect that civil contempt proceedings "are a part of the original cause" are not supportive of NLRB's contention that Norris-LaGuardia's Section 6 is inapplicable herein. It is one thing to say that contempt proceedings are part of the original cause; it is an entirely different matter whether Congress rendered inapplicable *Norris-LaGuardia's* Section 6 to the civil contempt charge herein. Likewise, the irrelevancy

(Footnote continued on next page.)

UMW's Reply to NLRB's Argument 3.

The Sixth Circuit rejected Petitioners' argument that activities complained of by NLRB referred to new and independent circumstances not related to conduct which occasioned the Sixth Circuit's 1960 decree, and admittedly involved employers not in business in 1960 and employers not charging parties in proceedings which the 1960 decree enforced. Urging that prior opinions in the Sixth and Second Circuits both upheld and denied the Sixth Circuit's rejection herein, while views in the First and Ninth Circuits were divergent from the Sixth Circuit's action herein, Petitioners invited the award of certiorari to settle the conflict (Pet. 30-35).

NLRB's challenge of Petitioners' assertion of new and independent set of circumstances must be evaluated in light of *admitted* facts (Pet. 31) that of the three charging parties Terry Elkhorn did not start business until *1964*—about four years *after* the Sixth Circuit entered its enforcement decree, that Wright began transporting coal for Terry Elkhorn in 1966, and that while Mahan engaged in coal mining since 1959 and agreed in 1964 to build and operate a tipple for Elkhorn, neither of the three operations was a charging party in the proceedings which led to entry of the enforcement decree in 1960. It is noteworthy that the 1960 enforcement decree was a *consent* decree; and, as stated in *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651, "The consent is to be read as directed toward events *as they then were*."

NLRB's charge (Br. 9) that *Tosh* v. *West Kentucky Coal Co.*, 6 Cir., 252 Fed. 44, is inapplicable must be ap-

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of *Amal. Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269, is readily apparent in that it involved the problem of whether a *private party*, as distinguished from NLRB itself, could complain of an employer's failure to comply with a court of appeals' enforcement of a Board order.

praised by the above-noted admitted facts and quotations therefrom found in the certiorari petition (pp. 32-33). But even if both *Tosh* and the First Circuit's *NLRB* v. *Reed & Prince Mfg. Co.*, 196 F. 2d 755, 760, are inapplicable for reasons assigned by NLRB, which Petitioners deny, it is noteworthy that NLRB does not claim that the Sixth Circuit's view in the instant case is *not* in conflict with those in the Ninth Circuit's *NLRB* v. *Pacific Greyhound Lines*, 106 F.2d 867 and the Second Circuit's *NLRB* v. *New York Merchandise Co., Inc.*, 134 F. 2d 949, 953. Petitioners' claim of conflict between the circuits is thus conceded by NLRB. This Court should settle the conflict.

Notably, NLRB concedes (Br. 9, fn. 6), as Petitioners charge (Pet. 7), NLRB could have but did not process the 8(b)(1)(A) charges at the same time it processed 8(b)(7) charges filed by the same employers. In neither *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 194-95, nor *Thompson Products* v. *NLRB*, 6 Cir., 133 F. 2d 637, did a federal agency concern itself with processing one charge and resorting to contempt proceedings in the other, where both charges involved a single set of facts and circumstances. Hence their inappositeness.

UMW's Reply to NLRB's Argument 4.

NLRB does not challenge Petitioners' assertion (Pet. 35-37) that all picketing had ceased prior to NLRB's filing of its contempt petition. Its argument that the contempt remedy "would be substantially impaired if respondents could so easily avoid the impact of a remedial decree" runs counter to doctrinaire expressed in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 and reiterated and implemented in other cases cited by Petitioners (Pet. 35-37), and with which the Fifth Circuit's *NLRB* v. *Mooney Aircraft, Inc.*, 61 LRRM 2163, 2164, are definitely

discordant. Neither *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 567-68, nor *NLRB* v. *Pool Mfg. Co.*, 339 U.S. 577, 581-82, supports NLRB's position, since neither involved the issue of mootness in a civil *contempt* proceeding and both concerned the Board's right to have a court of appeals accord to it *enforcement of its orders* as Congress mandated in the Act's Section 10. That problem is not in issue herein, the Sixth Circuit having been fully responsive to the Board's enforcement request in its May, 1960 decree.

Contrary to NLRB (Br. 8), the instant case does not present merely an evidentiary issue which does not warrant further review. As already noted (*ante*, p. 3), a vital question pertaining to the findings herein is whether both the Master and the Sixth Circuit applied correct evidentiary *standards*, an issue with which this Court was not concerned in *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. The irrelevancy of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-91, is readily apparent when it is considered that fact-finding by one of the tribunals discussed therein involved the *expertise* of the Board—not a Master appointed by the Sixth Circuit.

NLRB's effort (Br. 10, fn. 7) to discredit Petitioners' citation (Pet. 36-37) of *U.S.* v. *UMWA*, D.C. Cir., 190 F. 2d 865, is abortive. A ready answer to NLRB's distinction, namely, "there was no showing that the underlying labor dispute had been resolved" (Br. 10, fn. 7), is that nothing in the Board's order enforced by the 1960 decree required a settlement of the dispute. Indeed, such a requirement would have been in derogation of the right of collective bargaining accorded *employees* (29 USCA 157) of the three complaining employers and would have exceeded NLRB's powers under the Act's Section 10. The lack of requirement in the 1960 decree that there be a settlement

of the dispute is dispositive of NLRB's citations (Br. 11, fn. 7) of *Local 74, Carpenters* v. *NLRB*, 341 U.S. 707, 715 and *Division 1287, Amal. Bus Employees* v. *Missouri*, 374 U.S. 74, 77-78, as inapplicable.

UMW's Reply to NLRB's Argument 5.

No response is found in NLRB's Opposition Brief (p. 11) to Petitioners' contention (Pet. 39) that since civil contempt is wholly remedial the enormous fines placed upon Petitioners, though conditional, if payable to the Court, would be offensive to *Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 590-91 and *Gompers*, 221 U.S. 418, 441, holding that "If it is for civil contempt the punishment is remedial, and *for the benefit of the complainant*"; and, since Petitioners were charged with having done that which was prohibited, *Gompers* makes clear that "The only possible remedial relief for such disobedience would have been to impose a fine *for the use of complainant*, measured in some degree by the pecuniary injury caused by the acts of disobedience" (p. 444). Furthermore, the Court will note that NLRB's brief (p. 11) fails to challenge Petitioner's assertion that imposition of such fines is without evidentiary support (Pet. 38).

Nor does NLRB concern itself with answer to Petitioners' charge that *Gompers* rejects the Sixth Circuit's order which provides that future violations will cause the Court to deal therewith by such other means, including issuance of body attachments (Pet. 39), or to Petitioners' charge that inclusion thereof in the Sixth Circuit's order suggests pre-judgment by that court and lack of due process.

Nothing in *Shillitani* v. *U.S.*, 384 U.S. 364, 368-72, cited by NLRB (Br. 11), contravenes in anywise Peti-

tioners' foregoing assertions. Denial by NLRB (Br. 11, fn. 8) that the Sixth Circuit's order unduly expands the scope of the Board's original order overlooks the inclusion in the Sixth Circuit's instant order of the phrases "or of any other employers" and "Violating in any other manner this Court's decree of May 20, 1960" (Pet. 39-40).

CONCLUSION

For reasons assigned in the main Petition and herein, Petitioners, and each of them, pray that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit, entered in Case No. 14,226 on April 18, 1968.

Respectfully submitted,

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Dated: September, 1968